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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 550.

EARL MOORE, PETITIONER,

VS.

ILLINOIS CENTRAL RAILROAD COMPANY,
RESPONDENT.

BRIEF ON BEHALF OF PETITIONER, EARL MOORE.

GEO. BUTLER,
Jackson, Mississippi,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRELIMINARY.

This case is before the court on writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of said court reversing a judgment theretofore rendered in the District Court of the United States for the Jackson Division of the Southern District of Mississippi, in favor of petitioner, Earl Moore, plaintiff there, against respondent, Illinois Central Railroad Company, defendant in said district court. Writ of certiorari granted December 16, 1940.

OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the Supreme Court of the State of Mississippi is reported, *Moore* v. *Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593 (for opinion in full see appendix hereto).

The opinion of the District Court of the United States for the Jackson Division of the Southern District of Mississippi is in the record, pages 196-199, inclusive. This opinion is reported, *Moore* v. *Illinois Central Railroad Company*, 24 Fed. Supp. 731. The opinion of the Circuit Court of Appeals for the Fifth Circuit is in the record, pages 218-232, inclusive (including dissenting opinion). This opinion of the circuit court of appeals is reported *Illinois Central Railroad Company* v. *Moore*, and reverse title, 112 F. 2d 959 (dissenting opinion, page 967).

STATEMENT OF THE CASE.

Petitioner Moore was a railway switchman employed by respondent railroad company in its Jackson, Mississippi, yards, and as such was a member of the labor union with which respondent railroad company had a contract governing such employment. The effect of the contract as held by the Supreme Court of the State of Mississippi and of the circuit court of appeals in the respective opinions in this case hereinbefore referred to is that no employee shall be discharged without just cause. Petitioner, conceiving that he had been discharged without just cause, filed his suit here involved against the respondent railroad company for a lump sum as damages for breach of his contract of employment.

The suit was first filed in the Circuit Court of the First District of Hinds County, Mississippi, an intermediate trial court of the State of Mississippi. The suit

as first filed was for an amount less than the jurisdiction of the national court. The declaration or complaint so filed and involved appears in the record (R. pp. 1-3, incl.). The contract involved between respondent and the labor union was made an exhibit to the declaration or complaint and likewise appears in the record (R. pp. 4-17, incl.). The suit was and is clearly a suit for damages for the breach of said written contract.

In the Mississippi state court, amongst other defenses not here involved, respondent railroad company invoked and plead the Mississippi three year statute of limitations, the same being the statute applicable to suits on open accounts and unwritten contracts (R. p. 39).

Petitioner demurred to said plea assigning as ground for demurrer that the suit was based upon a written contract exhibited with the declaration and not upon a verbal contract (R. p. 38).

The cause came on for hearing, and said state trial court sustained petitioner's demurrer to respondent's said plea of the Mississippi three year statute of limitations, and thereby held that said three year statute of limitations was not applicable to petitioner's suit, but said state trial court rendered judgment against petitioner on other pleas which are not here involved (R. pp. 53-55).

Petitioner appealed from said adverse judgment and respondent railroad company filed its cross appeal and complained of the action of the lower court in holding that said three year statute of limitations was not applicable to petitioner's suit. The cause came on for hearing in the Supreme Court of the State of Mississippi and the Supreme Court of said state reversed the judgment of the lower court and remanded the cause thereto for further proceedings; specifically holding in its opinion that the Mississippi three year statute of limitations did not apply, but that the suit was a suit on a written contract and was governed by the Mississippi six year statute of limitations. *Moore* v. *Illinois Central Railroad Company*, 180 Miss. 276, 176 So. 593.

When the cause was reversed by the Supreme Court of the State of Mississippi, the same was returned to the lower court for further proceedings therein not inconsistent with said Supreme Court decision. When returned to the lower court, the declaration or complaint was amended and damages were demanded in an amount within the jurisdiction of the national court (R. pp. 56-57).

Thereupon, petitioner, plaintiff there, being a resident of the State of Mississippi, and respondent railroad company, defendant there, being a nonresident of the State of Mississippi, a diversity of citizenship existed, and upon petition of respondent railroad company, based solely upon the ground of diversity of citizenship, the cause was removed to the United States District Court for the Jackson Division of the Southern District of Mississippi (R. p. 57).

In the district court respondent railroad company again invoked and plead the Mississippi three year statute of limitations, along with other defenses not involved here, in the exact language as the plea to the same effect which had theretofore been filed in the state trial court and had been before the Supreme Court and passed upon by the Supreme Court of the State of Mississippi in *Moore* v. *Illinois Central Railroad Company, supra.* This plea in the district court is designated in the record as special plea No. 6 (R. pp. 75-76).

When the cause came on for hearing in the district court on said plea invoking the Mississippi three year statute of limitations, the district court held in accordance with the decision of the Mississippi Supreme Court in the same case, (*Moore* v. *Illinois Central Railroad Company, supra*) that the Mississippi three year statute of limitations did not apply, but that the suit was governed by the Mississippi six year statute of limitations and was not barred (see order, R. p. 86). And in a trial on the merits of the case, judgment was rendered in favor of petitioner and against respondent railroad company in the amount of $4,183.20 (R. p. 200).

From said judgment respondent railroad company appealed to the Circuit Court of Appeals for the Fifth Circuit, which court reversed the district court and held contrary to the Mississippi Supreme Court in this same case that the Mississippi three year statute of limitations and not the Mississippi six year statute of limitations is the applicable statute (R. pp. 218-232, incl.), Mr. Justice Holmes dissenting therefrom.

SPECIFICATION OF ERROR URGED.

Respondent railroad company raised all of the defenses in the district court which had theretofore been raised in the state court and which were discussed by the Supreme Court of the State of Mississippi in *Moore v. Illinois Central Railroad Company, supra.* The district court ruled against the contention of the respondent railroad company on each of said defenses and, as stated, judgment was rendered in favor of petitioner and against respondent railroad company there. On appeal the Court of Appeals for the Fifth Circuit reached the same result as did the district court on every question involved in the lawsuit, except the court of appeals reversed the district court on the sole ground that the district court committed error in holding, as did the Supreme Court of the State of Mississippi in this same case, that the three year statute of limitations of the State of Mississippi was not the applicable statute (see judgment of court of appeals, R. p. 233, opinion of court of appeals, R. pp. 218-232, incl., *Illinois Central Railroad Company v. Moore,* 112 F. 2d 959).

So, the only error assigned and to be urged here is the action of the circuit court of appeals in holding that the three year statute of limitations of the State of Mississippi is applicable in this cause.

ARGUMENT.

Petitioner Moore was employed in the State of Mississippi. His services were to be performed in the State of Mississippi. His services were actually performed within the State of Mississippi up to the time of his wrongful discharge.

The Mississippi statute which fixed the period of limitation on actions on unwritten contracts at three years is Section 2299 of the Code of Mississippi of 1930, which reads as follows:

> "2299. Actions to Be Brought in Three Years. —Actions on an open account or stated account not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of such action accrued, and not after."

Section 2292 of this said Code fixed the period of limitation in other actions, including actions on written contracts, at six years. This section reads as follows:

> "2292. Actions to Be Brought in Six Years— All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

When this identical case was first filed in the Mississippi State Court, respondent, who was the defendant there, invoked Section 2299 of the Code of Mississippi of 1930, the three year statute of limitations, and plead the same in bar of this suit. No other limitation was plead or invoked.

In this same lawsuit, in this identical case, the Supreme Court of the State of Mississippi, the court of last resort in said state, in its decision therein, *Moore* v.

Illinois Central Railroad Company, 180 Miss. 276, 176 So. 595, has held that of the two Mississippi statutes of limitations this was an action in which the Mississippi three year statute of limitations was not applicable, but the Mississippi six year statute was applicable, using the following language:

> "The appellee's sixth plea is to the effect that the appellant's cause of action is barred by Section 2299, Code of 1930, the three year statute of limitations, for the reason that 'the contract of employment between the plaintiff and this defendant was verbal, and the alleged breach of the contract occurred on February 15th, 1933, more than three years before the appellant's suit was begun.'
>
> "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, Section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under Section 2292, Code of 1930. The demurrer to this plea, therefore, was properly sustained. This question was presented by a cross appeal by the appellee."

Subsequent to the decision herein by the Mississippi Supreme Court, when this case on the sole ground of diversity of citizenship was removed to the federal court, respondent filed the identical plea which had been before the Mississippi Supreme Court and again invoked Section 2299 of the Code of Mississippi of 1930, the Mississippi three year statute of limitations.

Without these Mississippi statutes of limitations, Section 2299, the three year statute, and Section 2292, the six year statute, there would be no period of limitation to this action which respondent might have invoked. There is no period of limitation fixed thereon by the federal law.

We respectfully submit that when a state statute of limitations is invoked and applied in a federal court sitting in such state, the same should be construed and applied

as construed and applied by the decisions of the highest court of such state.

The rule in this regard is announced in the text 25 C. J. 849, as follows:

> "State statutes of limitations, as construed by the state court, should be applied in actions at law in a federal court where they are applicable * * *."

And again, 37 C. J. 697, as follows:

> "Where a state statute of limitations has been construed by the highest court of the state *as not applying to existing causes of action,* the same construction of the same statute will be adopted by federal courts, if not in conflict with the paramount authority of the Constitution or Laws of the United States or with the fundamental principles of justice and common right."

This is but the same rule which has been repeatedly announced and followed by the Supreme Court of the United States and the court of appeals of the various circuits long before the decisions of this court in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188; *Ruhlin* v. *New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290; and *Russell* v. *Todd,* 309 U. S. 293, 84 L. Ed. 762. Certainly when the federal court applies the statute of limitations of a state, it must apply the same as construed and as applied by the court of last resort of such state.

Bauserman v. *Blunt,* 147 U. S. 647, 37 L. Ed. 316;
Balkan v. *Woodstock Iron Company,* 154 U. S. 177, 38 L. Ed. 953;
Great Western Telephone Co. v. *Prudy,* 162 U. S. 329, 40 L. Ed. 986; and
Security Trust Co. v. *Black River Bank,* 187 U. S. 211, 47 L. Ed. 147.
First Circuit, *Andrews* v. *Bacon,* 38 Fed. 777.
Second Circuit, *Farley* v. *Carey Show Print Co.,* 249 Fed. 476.

Third Circuit, *Wilson* v. *Smith,* 117 Fed. 707; and
First Natl. Bk. v. *Anglo, etc., Bank,* 37 F. 2d 564.
Fourth Circuit, *Wheeling Bridge Co.* v. *Reymann Brewing Co.,* 90 Fed. 189;
Brunswick Terminal Co. v. *Natl. Bk.,* 99 Fed. 635; and
Weems v. *Carter,* 30 F. 2d 202.
Sixth Circuit, *Salyer* v. *Consolidation Coal Co.,* 246 Fed. 794.
Eighth Circuit, *Taylor* v. *Union Pac. R. R. Co.,* 123 Fed. 155;
Young v. *Alexander,* 29 F. 2d 555 and
Futrell v. *Branson,* 104 F. 2d 409.
Ninth Circuit, *Bullion & Exchange Bank* v. *Hegler,* 93 Fed. 890; and
Van Dyke v. *Parker,* 83 F. 2d 35.
Tenth Circuit, *Arkansas Fuel Oil Co.* v. *City of Blackwell,* 87 F. 2d 50.

As aptly stated by the Court of Appeals for the Tenth Circuit in *Arkansas Fuel Oil Company* v. *City of Blackwell, supra,* where the Oklahoma statute of limitations was involved; "for limitation of actions is purely statutory, and the Oklahoma statutes mean what the Supreme Court of Oklahoma says they mean."

The Mississippi Supreme Court in this identical case, *Moore* v. *Illinois Central Railroad Company,* 180 Miss. 276, 176 So. 595, has said that the three year statute of limitations which respondent has invoked does not apply to this particular suit, but that the Mississippi six year statute is the applicable statute.

Moore v. *Illinois Central Railroad Company, supra,* in which the Mississippi Supreme Court construed and applied its own statute of limitations in this identical case, stands as the law of the State of Mississippi as declared by its highest judicial tribunal. It has not modified, retracted, altered or amended its opinion. Instead of altering, or modifying, or retracting, or amending said

opinion, the Supreme Court of the State of Mississippi has in effect reaffirmed the same. A vigorous suggestion of error was filed attacking said opinion, and the same was by the court overruled on January 3, 1938 (see official report, 180 Miss. 276).

The decision of the Mississippi Court in *Moore* v. *Illinois Central Railroad Company, supra,* this identical case, should control. *Wichita Royalty Company* v. *Bank,* 306 U. S. 103, 83 L. Ed. 515; *West* v. *American Telephone & Telegraph Co.,* 85 L. Ed. (Advance Sheet) 146, decided December 9, 1940; *Six Companies of California* v. *Joint Highway District,* 85 L. Ed. 159; *Fidelity Union Trust Co.* v. *Field,* 85 L. Ed. 176, both likewise decided December 9, 1940; and *Stoner* v. *New York Life Ins. Co.,* 85 L. Ed. 275, decided December 23, 1940.

But it is said that the judgment of the Mississippi Supreme Court is not conclusive; that it might alter or reconsider the same. This is purely conjecture. The fact remains that it has not done so. See *Wichita Royalty Co.* v. *Bank, supra; West* v. *Am. Tel. & Tel. Co., supra; Six Companies of California* v. *Joint Highway District, supra; Fidelity Union Trust Co.* v. *Field, supra;* and *Stoner* v. *N. Y. Life Ins. Co., supra.*

As it will appear, Section 2299, the three year statute of limitations of the State of Mississippi, applies to actions on unwritten contracts, and Section 2292 of the Code of Mississippi of 1930, the six year statute of limitations, applies to actions on written contracts.

Moore v. *Illinois Central Railroad Company, supra,* in holding as hereinbefore set forth is in no sense blazing a trial in Mississippi jurisprudence. The decision therein on the point here involved is in accord with prior decisions of the Mississippi court. The Supreme Court of the State of Mississippi in two fully considered opinions has held that a suit of the character involved here is a suit on a written contract; a suit for damages for breach of a contract made for the benefit of a class of persons.

The effect of the holding in these two cases being that in such a suit the six year statute of limitations, and not the three year statute of limitations, is applicable. *Gulf & Ship Island Railroad Company* v. *McGlohn,* 183 Miss. 465, 184 So. 71; *Same Case,* 179 Miss. 396, 174 So. 250; and *Y. & M. V. R. R. Co.* v. *Sideboard,* 161 Miss. 4, 133 So. 669.

This is not a matter governed by the Federal Constitution or by acts of Congress. The Supreme Court in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, has said that except in matters so governed the federal court sitting in a state should follow the law of such state whether so declared by its legislature or its highest court.

This case reached the federal court and reached the Circuit Court of Appeals for the Fifth Circuit solely by reason of diversity of citizenship of the parties.

As has been very well stated, the decision in *Erie Railroad Company* v. *Tompkins, supra,* was intended to prevent the arising of a difference in the substantive rights of litigants as a result of the mere accident of diversity of citizenship.

If the decision of the court of appeals is allowed to stand, we have this queer situation; a situation typical of the kind the Supreme Court was endeavoring to prevent by its decisions in the Erie Railroad Company Case, *supra,* and in the subsequent cases mentioned. Petitioner's suit is barred by the three year statute of limitations of the State of Mississippi by the mere accident of diversity of citizenship and because he happened to sue for an amount within the jurisdiction of the federal court. His brother in toil, his next door neighbor, has an identical suit against the identical defendant and in which the exact time has elapsed which had elapsed at the time petitioner brought his suit. The only difference is the neighbor's suit is for only $2,500. He brings his suit in the state court and there it remains, and under the decision of the

Supreme Court of the State of Mississippi in *Moore* v. *Illinois Central Railroad Company, supra,* petitioner's own suit, his neighbor's case is not barred and friend neighbor can maintain his suit.

Further illustrating:

A sues the railroad company in a suit of this character for $3,000. His suit remains in the state court, and he can maintain it because the Mississippi Supreme Court in applying its own statute has said it is not barred by the Mississippi three year statute of limitations. B sues the railroad company in the same court, in an identical suit, but he sues for $3,001. His case is moved to the federal court and is barred by the Mississippi three year statute, so B loses and A wins just because the railroad company owes B one dollar more than it owes A.

Again, Moore, petitioner, has another fellow worker, another neighbor, who has an identical claim against the Yazoo & Mississippi Valley Railroad Company. This last-mentioned railroad company is a subsidiary corporation domiciled in the State of Mississippi. He likewise is a resident of the State of Mississippi. He has a claim against his railroad exactly like petitioner's. Even the amount involved is the same. He files his suit in the state court, and because the accident of diversity of citizenship does not exist, his suit is not barred by the three year statute of limitations and he can maintain his suit under the authority of the decision of the Supreme Court of the State of Mississippi rendered in petitioner Moore's own lawsuit.

We do not believe that a situation such as illustrated was ever intended, or that such a situation should or will be allowed to stand. With all deference, if the *Erie Railroad Company Case, supra,* and the subsequent cases mentioned do not eliminate such a situation, we have wholly misconstrued the intent thereof.

CONCLUSION.

It is, therefore, respectfully submitted that the Circuit Court of Appeals for the Fifth Circuit is in error in holding that the Mississippi three year statute of limitations is applicable in this case, contrary to the holding of the Supreme Court of the State of Mississippi in this identical case. The judgment of the court of appeals reversing judgment of the district court in favor of petitioner and against respondent is erroneous.

Respectfully submitted,

GEO. BUTLER,
Jackson, Mississippi,
GARNER W. GREEN,
Jackson, Mississippi,
Counsel for Petitioner.

Certificate.

Service of the foregoing Brief for Petitioner is hereby acknowledged, this the_____day of _____, 1941.

JAMES L. BYRD,
Jackson, Mississippi,
Of Counsel for Respondent.

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APPENDIX.

The opinion of the Supreme Court of the State of Mississippi in the case before the court, Moore v. Illinois Central Railroad Company, No. 32,860, decided November 8, 1937, reported 180 Miss. 276, 176 So. 593, is as follows:

SMITH, Chief Justice.

The appellant sued the appellee on an alleged breach of a contract of employment. The appellee filed six special pleas. Demurrers by the appellant to the first four pleas were overruled. The appellant replied to the fifth plea and a demurrer to his replication was sustained, as was also his demurrer to the appellee's sixth plea. The appellant declined to plead further, and judgment final against him was rendered.

The declaration alleges, in substance, that on and long prior to February 15, 1933, the plaintiff was a member of the Brotherhood of Railroad Trainmen, with which the defendant had entered into a contract which provided the rules, rates of pay, etc., for trainmen employed by it. That the plaintiff had been employed by the defendant as a trainman since June 2, 1926, and on November 13, 1926, the defendant, in accordance with its contract with the Brotherhood of Railroad Trainmen, published a seniority roster for its trainmen, giving the plaintiff No. 52 thereon. Under the provisions of the contract, the trainmen were given work by the defendant according to their seniority on this roster, and, among other things, the contract provided that no employee should be discharged by the defendant without just cause. That although the plaintiff had rendered the defendant faithful and efficient service, and was ready, willing, and able to so continue, he was arbitrarily discharged by the defendant on February 15, 1933, since which he has been unable to

obtain employment, to the damages of the plaintiff in the sum of $3,000. The Brotherhood of Railroad Trainmen's contract was filed as an exhibit to the declaration, and is practically identical with the one under consideration in Moore v. Yazoo & M. V. R. Co., 176 Miss. 65, 166 So 395, and McGlohn v. Gulf & S. I. R. R. (Miss.) 174 So. 250.

[1] The first three of the appellee's pleas allege, in substance: The first plea, that the employment of the plaintiff was not for a definite time, and was terminable at will; the second plea, that the contract sued on is unilateral, there being no agreement on the part of the plaintiff to perform any services whatever for the defendant, and was without consideration; the third plea, that the contract sued on was not one of hiring between the plaintiff and the defendant, but was merely a schedule of wages governing yardmen and switchmen, and that by it no switchman was employed for any specific period, no switchman agreed to perform any service for the defendant for any specified time, and, therefore furnishes no basis for a recovery by the plaintiff.

These pleas seem to be, in fact, demurrers, but aside from that, the demurrers thereto should have been sustained under McGlohn v. Gulf & S. I. R. R., supra, wherein the court held that a contract by a labor union with an employer, similar to the one here, was: (1) Valid; (2) that a member of the labor union which made the contract could sue thereon, although he had not, himself, agreed to work for the employer for any definite time; and (3) could not be discharged by the employer at will. That case was decided after the trial in the court below of the case now under consideration.

[2] The fourth plea set forth a provision of the contract sued on, reading as follows: "(d) Yardmen or switchtenders taken out of the service are censured for cause, shall be notified by the Company of the reason therefor, and shall be given a hearing within five days

after being taken out of the service, if demanded, and if held longer shall be paid for all time so held at their regular rate of pay. Yardmen or switchtenders shall have the right to be present and to have an employee of their choice at hearings and investigations, to hear the testimony; and ask questions which will bring out facts pertinent to the case. They shall also have the right to bring such witnesses as they desire to give testimony, and may appeal to higher officers of the Company in case the decision is unsatisfactory. Such decision shall be made known within three days at New Orleans and at other points ten days after the hearing, or yardmen or switchtenders shall be paid for all time lost after the expiration of three days at New Orleans and ten days at other points. In case the suspension or dismissal or censure is found to be unjust, yardmen or switchtenders shall be reinstated and paid for all time lost." It then alleges, in substance, that when the appellant was discharged on February 15, 1933, he was notified thereof, in writing, by the defendant's superintendent, whereupon the plaintiff notified the superintendent in writing that he desired a hearing on his discharge, which request was complied with by the superintendent. While the plea does not so allege, it is clear therefrom that the superintendent declined to reinstate the plaintiff, whereupon he gave written notice to the defendant that he desired to appeal from this ruling of the superintendent. The defendant, through its proper officers, advised the plaintiff that a hearing on this appeal would be accorded him on a named date, but the plaintiff failed to appear and abandoned his appeal, because of which he is without the right to maintain this suit.

The appellant is not seeking to be restored to the appellee's employment, nor does his complaint involve any question of discipline or policy arising under the contract. It includes only his right, vel non, to damages, because of his alleged discharge by the appellee, for the determina-

tion of which the courts are open to him without his having exercised his right to attempt to gain his reinstatement in the appellee's employ by appealing from its superintendent to his superior officers. Independent Order of Sons & Daughters of Jacob v. Wilkes, 98 Miss. 179, 53 So. 493, 52 L.R.A.(N.S.) 817; Eminent Household of Columbian Woodmen v. Ramsey, 118 Miss. 454, 79 So. 351, and Eminent Household of Columbian Woodmen v. Payne, 18 Ala.App. 23, 88 So. 454. The demurrer to this plea should have been sustained.

[3] The fifth plea is one of res judicata, and alleges, in substance, that on October 15, 1932, the plaintiff sued the defendant in the First district of Hinds county, in a cause appearing there as No. 8232, and on February 23, 1933, filed an amended declaration therein alleging that he had been given a lower place on the defendant's seniority roster, resulting in his being, in effect, discharged, by reason of which he had been damaged. After the filing of this amended declaration, the defendant filed the following third special plea: "Now comes the defendant, Illinois Central Railroad Company, by its attorneys, and for a further and special plea to the declaration herein, says that in any event, the plaintiff is not entitled to recover pay for any time after the 15th day of February, 1933, because it says that on said 15th day of February, 1933, it notified the said plaintiff, Earl Moore, in writing, that his services were no longer desired, and that his employment was at an end, and his said employment with this defendant did end on said date and any right the said Moore might have had to work for the defendant ceased on said date." To this plea, the appellant replied as follows: "And now comes the plaintiff and for replication to the third special plea of the Illinois Central Railroad Company heretofore filed herein says that nothing therein contained should defeat or prevent the maintenance of plaintiff's cause of action, because it is alleged in the declaration and in the exhibits annexed thereto un-

der Article 17 of said Exhibit, the following, 'No switchman will be discharged or suspended without just cause,' and said special plea does not allege that the said defendant, Illinois Central Railroad, had any sufficient cause of firing the said plaintiff, who was a switchman and the said plaintiff does hereby allege and aver that the only reason that he was fired was because that he had filed this lawsuit seeking a redress of his wrongs in the defendants, and plaintiff avers that the filing of a lawsuit to compel the courts to perform their contracts is not sufficient cause within the meaning of said contract of employment. All of which the defendant is ready to verify." Issue on this replication was joined by consent, and the cause proceeded to trial resulting in a verdict for the defendant, and a judgment that the plaintiff recover nothing.

The replication of the plaintiff to this plea of res judicata sets forth, among other things, that: "It was alleged in said declaration, in suit No. 8232, and the following allegation constituted the gist of plaintiff's action herein, that the said defendants therein had breached a contract between the Switchman's Union of North America, of which plaintiff was, at the time he went to work for the Alabama & Vicksburg Railway Company, a member, in that he had been given a lower place on the seniority roster of both defendants in their Jackson yards than the place to which he was entitled under the contract, yet plaintiff avers that the basis of his cause of action in said cause, to-wit, No. 8232, was breach of the contract originally entered into between the said Alabama & Vicksburg Railway Company and the Switchman's Union of North America, for a failure of this defendant and the Yazoo and Mississippi Valley Railroad Company to give him the place upon the seniority roster to which he was entitled, the contract between the Switchman's Union of North America, and the Alabama & Vicksburg Railway Company having been expressly assumed as alleged in the pleadings in said cause by the defendants

therein, and all other matters alleged, either in the declaration or in any subsequent pleadings filed by either party thereto, did not form the basis of plaintiff's cause of action therein, but went merely to show and explain the extent of damages suffered by said plaintiff, or any attempt by the defendants to limit said damages. That the cause of action between the Illinois Central Railroad Company and this plaintiff in said cause No. 8232, is in no way identical with the cause of action here sued on, because the cause of action here sued on is based not upon the Switchman's Union contract, but a contract between this defendant and the Brotherhood of Railroad Trainmen. The basis of this suit is not a failure to give plaintiff a place upon the seniority roster to which he conceived he was entitled, but is a suit for his wrongful discharge under a contract of hire. Plaintiff further alleges that said plea constitutes no defense because cause No. 8232 was decided by this court and affirmed by the Supreme Court [Moore v. Yazoo & M. V. R. Co., 176 Miss. 65, 166 So. 395] upon the grounds that the contract therein sued on provided that within thirty days after the promulgation of the seniority list, the seniority list therein sued on having been promulgated in November, 1928, that any person not being satisfied with the number given him thereon should, within thirty days after the promulgation of said list, file a written protest; that this the plaintiff in cause No. 8232 failed to do personally within the time required by the contract between the Switchman's Union of North America and the Alabama & Vicksburg Railway Company, and for that reason a directed verdict was rendered against said plaintiff, which was affirmed by the Supreme Court of the State of Mississippi, a copy of the opinion of the Circuit Court and the opinion of the Supreme Court both being attached hereto marked Exhibits 'B' and 'C' respectively, and prayed to be considered a part hereof as fully and completely as if copied herein, and the issue herein involved

has never been decided upon its merits either by this court or any other court. All of which the plaintiff is ready to verify." The declaration in the former suit, filed as an exhibit to this replication, is in accord therewith.

It appears from the appellee's fifth plea that this discharge of the appellant was pleaded by it in the former suit, not in bar of the action, but only in bar of the right of the appellant "to recover pay for any time after the 15th day of February, 1933," the date of his discharge.

The appellee says that the wrongfulness, vel non, of the appellant's discharge by it on February 15, 1933, was one of the questions presented and litigated in the former suit, and was decided by the verdict and judgment there rendered.

The appellant admits that this question was presented in the former suit by the appellee's plea, but says that it did not and could not have entered into the verdict and judgment rendered; and, further, that the evidence necessary to support his there cause of action differed, in material aspects, from that necessary to support his cause of action here sued on.

It appears from the replication to this plea of res judicata, and from the opinions of the trial and the Supreme Court, to which both the appellant and the appellee, in their pleadings, refer, that the trial court directed the jury to return a verdict for the defendant, but, in so doing, did not and could not have considered and determined the wrongfulness, vel non, of the appellant's discharge by the appellee on February 15, 1933; and, further, that the trial court directed the jury's verdict only on the ground that the appellant had no cause of action because of his having been given the wrong number on the appellee's roster of workmen, and therefore could recover nothing. Had a recovery been allowed for the time intervening between the publication of the appellee's roster and the appellant's discharge on February 15, 1933, a different question would be here presented. The judgment in the former suit is not res judicata here.

We have left out of view the fact that the appellant here sues on a contract made with the appellee by the Brotherhood of Railroad Trainmen, and in the former suit on a contract made with appellee by the Switchman's Union of North America, the provisions of which are similar.

The appellant's demurrers to the first four pleas should have been sustained, and the appellee's demurrer to the appellant's replication to the fifth plea should have been overruled.

[4] The appellee's sixth plea is to the effect that the appellant's cause of action is barred by section 2299, Code of 1930, the 3-year statute of limitations, for the reason that "the contract of employment between the plaintiff and this defendant was verbal, and the alleged breach of the contract occurred on February 15th, 1933, more than three years before the appellant's suit was begun."

The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930. The demurrer to this plea, therefore, was properly sustained. This question was presented by a cross-appeal by the appellee.

Reversed and remanded.

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